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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third and Tenth Circuit

BRIEF OF THE INDEPENDENT WOMEN'S FORUM AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

The Independent Women's Forum ("IWF") is a non-partisan, 501(c)(3) research and educational institution. IWF seeks the advancement of women in today's marketplace and the full flourishing of human dignity through freedom and choice. IWF believes that gender equality and access to health care, including preventative services like contraception, are compelling government interests. IWF is concerned, however, that the contraception mandate may disadvantage women by adversely affecting health and employment options and impinging on religious liberty.

IWF believes that women have ready access to affordable contraceptives. Nine in ten employer-based insurance plans cover the full range of contraceptives. Twenty-eight states require insurers that cover prescription drugs to cover the full range of FDA-approved contraceptive drugs and devices. And a plethora of federal and state programs currently provide free contraceptive services to women with low incomes. Public funding for these services totaled $2.37 billion in 2010. In addition to public sources, clinics and other entities like Planned Parenthood provide free access to contraception.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Independent Women's Forum states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of amicus curiae's intent to file this brief. Petitioner and respondent have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

For women who make too much to qualify for free preventative care services, contraceptives are an affordable healthcare option. Generic contraceptives can be purchased for as low as $9 per month. Non-prescription options with similar efficacy rates, like condoms and vaginal sponges, are easy to purchase and inexpensive. The American Pregnancy Association, for example, estimates that condoms cost as little as twenty cents each—less than a pack of chewing gum. There is, in short, no need for the contraception mandate.

Perhaps for this reason, the Government has exempted over 190 million health plan participants from the contraception mandate. The requirement does not apply to employers with fewer than fifty full-time employees, grandfathered health plans, and certain religious non-profits, like churches. Exempt from the mandate also are certain forms of contraception—including those that can be used by men. That the Government chose to exempt hundreds of millions of women (and all men) undermines any asserted compelling interest in public health or a one-size-fits-all insurance system.

IWF believes the Government can promote public health in other ways. It could, for example, expand eligibility for the federal programs already in existence, offer tax deductions, credits, or federal reimbursements for the purchase of contraceptive services, or provide incentives for pharmaceutical companies to provide products free of charge. Indeed, and ironically, the best way to broaden access to birth control might be to heed the American College of Obstetricians and Gynecologists recommendation and make birth control available without a prescription.

IWF believes that the contraception mandate will make contraception more expensive. Because insurers are required to provide *first-dollar* coverage, price will no longer be a consideration. This will result in higher health-care costs and make contraceptives less affordable, and thus less accessible, to millions of *uninsured* women. According to CBO, some 30 million people will remain uninsured after full implementation of the Affordable Care Act. Even if only half are women, the mandate will have a detrimental impact on millions. And of course there is no such thing as a free lunch, even to the insured. The (higher) costs of contraception coverage likely will be passed on to employees through lower salaries or decreased benefits.

IWF also is concerned that the contraception mandate may have other detrimental effects on women's health. Studies have shown, for example, that increased access to other contraceptives decreases condom usage—a means of preventing sexually transmitted diseases in addition to pregnancy.

The contraception mandate also overlooks that women and their families benefit from a flexible work environment that allows them the option of their preferences. Women may choose to prioritize a higher salary, or the ability to work from home, over more generous contraceptive coverage. And older women, in particular, may prioritize other health benefits, like cancer coverage.

This case is about more than contraception. It is about the principles of liberty that animate our Constitution. It is about empowering women to choose the healthcare and salary options that best fit their needs. And it is about employers, many of them

women, being able to follow their deeply held religious conviction that life begins at conception.

IWF believes in a pluralistic society and that the Government should not require individuals to pay for services contrary to their faith. The burden becomes clear when one's own moral wrong is required by law. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND (2012). Take, for example, a hypothetical example of a different administration requiring that all group health insurance plans cover conversion and reparative therapy. The fact that an employee would make the individual choice to receive such therapy would do little to assuage the moral qualms of individuals and companies who support same-sex couples. Such individuals and companies would be forced to pay premiums for, and facilitate use of, health services they find abhorrent.

There is historical precedent for precisely this challenge of conscience versus the perceived greater good. The Quaker faith forbids taking up arms against another. During the Revolutionary War, the colonies required able-bodied men to serve in the militia or pay a stiff fine. A wealthy landowner could avoid the draft by hiring a soldier as his substitute. But the Quakers refused not only to fight but also to send someone else to fight in their stead or to pay fines to finance what they saw as a morally objectionable war. *See* KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG 49-52 (2005).

IWF believes that all of these arguments should not be foreclosed solely because the penalties imposed by the contraception mandate are made payable to the IRS. The Government does not argue that the Anti-Injunction Act applies to this case. Accordingly, the

defense is forfeited and poses no bar to resolution of the critical constitutional questions at issue here.

If the Supreme Court's privacy jurisprudence tells us anything, it is that the deeply personal choices about when life begins and whether or not to use birth control are decisions for individuals and families, not the Government. IWF believes that the Government should leave those decisions to women and their families.

SUMMARY OF ARGUMENT

The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), provides: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." That provision does not bar review of this case. A unanimous Tenth Circuit concluded that the Anti-Injunction Act does not apply because the relevant penalties are not taxes within the meaning of the AIA. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 127-28 (10th Cir. 2013); *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-38 (1922) (distinguishing taxes from penalties by heavy burden, scienter, and partial enforcement by a non-IRS agency). But there is no need to answer that question at all. The Anti-Injunction Act does not apply first and foremost because it is not jurisdictional and because the Government has forfeited any reliance on the statute.

It is a hallmark of our judicial system that, subject to standing requirements, a litigant ordinarily is entitled to her day in court before she suffers the penalties for noncompliance with an unconstitutional statute or regulation. Pre-enforcement challenges are a commonplace. To hold that the Anti-Injunction Act bars suit here would turn that principle on its head.

If the AIA were jurisdictional, the Greens and Hahns would be forced to pay millions of dollars in penalties and file a refund suit before raising their First Amendment claims. This is constitutionally troublesome. The choice between massive penalties and conscience rights may not be a realistic one for many employers. And more importantly, pre-enforcement review is almost always available in cases like this one because damage remedies (like a refund) are wholly inadequate to compensate a plaintiff for the loss of a First Amendment right. Douglas Laycock, THE DEATH OF THE IRREPARABLE INJURY RULE, 103 HARV. L. REV. 687, 707-09 (1990). Religious liberty is not a freedom reserved for the wealthy.

The Anti-Injunction Act is not jurisdictional because its text does not contain the clear jurisdictional limitation this Court's cases require. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). It is a claims-processing statute that speaks to the obligations of litigants, not the power of the federal courts. It is placed in a miscellaneous tax code provision that governs administration and procedure. And it contains numerous statutory and judicially created exceptions. While the Court occasionally has referred in passing to the AIA as "jurisdictional," this Court's more recent cases teach that loose language does not a jurisdictional provision make. It is the substance of this Court's decisions, and not imprecise use of the term jurisdiction that governs. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (courts may not rely on "less than meticulous" use of the term "jurisdictional").

From its earliest days, moreover, this Court has interpreted the AIA to be non-jurisdictional. The Court consistently has held the AIA subject to

traditional equitable exceptions. *See, e.g., Miller v. Standard Nut*, 284 U.S. 498 (1932). These exceptions have culminated in two well-established exceptions today. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *South Carolina v. Regan*, 465 U.S. 367 (1984). In several cases, moreover, the Court also has permitted the Government to waive the AIA defense and proceeded to the merits. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937). If a provision is truly jurisdictional, equitable exceptions are taboo and waiver impossible. Taken individually, then, each of these precedents would cast doubt on a jurisdictional AIA; taken as a whole, they foreclose that possibility.

ARGUMENT

I. THE ANTI-INJUNCTION ACT IS NOT JURISDICTIONAL AND THIS COURT NEED NOT CONSIDER WHETHER IT APPLIES

The federal government has forfeited any reliance upon the Anti-Injunction Act and this Court need not consider whether it applies unless the prohibition is jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). The AIA is not jurisdictional and this Court may proceed to the merits.

This Court recently has emphasized that jurisdiction has become "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). Because courts have been overinclusive—"profligate" even, *see Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009)—in their use of the term, this Court has sought to restore "discipline" to the phrase jurisdictional. *Henderson*, 131 S. Ct. at 1202-03.

There is a distinction, this Court's recent cases teach, between "claims-processing" rules and truly jurisdictional provisions. Jurisdictional statutes speak to the very power of a federal court to hear a case; they govern the court's "adjudicatory authority." *Kontrick*, 540 U. S. at 455; *see also Steel Co.*, 523 U.S. at 89 ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case") (emphasis in original). In contrast, claims-processing rules simply "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

To differentiate between claims-processing rules and jurisdictional limitations, this Court looks to text, structure, and context. First, the Court employs a "clear-statement principle," to determine whether the text plainly indicates that a procedural requirement is jurisdictional. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012). The Court then considers whether the structure of the statute compels a jurisdictional conclusion. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-46 (2010). Finally, the Court considers context, which sometimes may include past precedent. *See Bowles v. Russell*, 551 U.S. 205, 209-11 (2007). Each of these factors indicates that the Anti-Injunction Act is not jurisdictional.

A. The AIA's Text Does Not Clearly Indicate Jurisdictional Status

The first question is whether the text of the AIA contains a clear statement limiting jurisdiction. *Henderson*, 131 S. Ct. at 1203 (citing *Arbaugh*, 546 U.S. at 515-16). The answer is no. A provision is jurisdictional only where Congress "clearly state[s]

that [the] threshold limitation on a statute's scope shall count as jurisdictional. . . ." *Arbaugh*, 546 U.S. at 515-16. In contrast, "when Congress does not rank a statutory limitation as jurisdictional, then courts should treat the provision as nonjurisdictional in character." *Id.*

The text of the AIA contains no such clear statement. At the outset, the AIA does not mention jurisdiction in so many words. *See Thaler*, 132 S. Ct. at 651 (citing *Henderson*, 131 S. Ct. at 1205) (rejecting notion that "all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional"); *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) ("shall" does not render a requirement jurisdictional). This is important because Congress knows how to speak in jurisdictional terms when it chooses. Consider some forthrightly jurisdictional statutes. The Tax Injunction Act, for example, is directed to the adjudicatory power of the federal courts: "The *district courts shall not* enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (emphasis added). Congress's failure to use similar "unambiguous jurisdictional terms," *Thaler*, 132 S. Ct. at 649, "indicates" that the AIA operates differently. *Williams Packing*, 370 U.S. at 6 (if Congress desired the AIA to have the same effect as the TIA "it would have said so explicitly"); *see also Thaler*, 132 S. Ct. at 649 ("unambiguous jurisdictional terms" in a related statute are evidence that Congress "would have spoken in clearer terms if it intended [the statute] to have similar jurisdictional force").

What the text indicates instead is that the AIA is a claims-processing statute. As this Court previously

has explained, the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. This is the very definition of a claims-processing rule. The AIA does nothing more than "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203 (defining claims-processing rules).

The AIA, in other words, is not jurisdictional because it is addressed to litigants, not the adjudicatory authority of federal courts. "[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (quoting *Republican Nat. Bank of Miami*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). The AIA focuses on party obligations. Section 7421(a) provides that "no suit [to restrain taxes] shall be maintained in any court by *any person*." 26 U.S.C. § 7421(a) (emphasis added). Congress amended the AIA in 1964 to add the phrase "by any person whether or not the person is the person against whom such tax was assessed." This phrase clarifies that the AIA applies to persons whether or not that person bears the incidence of the tax, *see Regan*, 465 U.S. at 377, and confirms that the AIA speaks to litigants, not the federal courts.

The requirement that a party satisfy some step prior to bringing suit in federal court is hardly novel: it is an exhaustion requirement. Exhaustion requirements are "quintessential claims-processing rules." *Henderson*, 131 S. Ct. at 1203. Because exhaustion requirements merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,"

id., this Court has time and again found them to be non-jurisdictional. *See e.g., Reed Elsevier, Inc.*, 130 S. Ct. at 1246-47 (citing cases).

In *Jones v. Bock*, for instance, this Court held that the Prison Litigation Reform Act's administrative exhaustion requirement—"no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted" is not jurisdictional. 549 U.S. 199, 211-12 (2007). So too here. The AIA is not jurisdictional because it focuses on a litigant's exhaustion obligations. And like other exhaustion regimes, the AIA does not forever bar federal court review of a class of cases (as does the Tax Injunction Act), but instead assumes that suits blocked by the AIA eventually may end up in federal court.

Reed Elsevier, Inc. v. Muchnick is also instructive. In that case, the Court held Section 411(a) of the Copyright Act—"no civil action for infringement of the copyright in any United States work shall be instituted" until the copyright is registered—to be non-jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1249. Because Section 411(a) placed conditions on plaintiffs (and not the federal courts), the Court found the provision did not "clearly state[]" that its registration requirement was jurisdictional. *Id.* at 1245-46. The relevant text of Section 411(a)—"no civil action . . . shall be instituted"—bears a striking resemblance to the AIA's language—"no suit . . . shall be maintained." Both are addressed to particular litigants, couched in mandatory language, and part of a remedial scheme. Like Section 411(a), the AIA does not "clearly state" that its pre-payment requirement is jurisdictional.

In sum, the text of the AIA does not *clearly* indicate jurisdictional status. The statute does not employ

jurisdictional language, it is addressed to private litigants, and it is part of an exhaustion regime that eventually provides for federal court review.

B. The Structure Of The AIA Indicates That The Statute Is Not Jurisdictional

The structure of the Anti-Injunction Act also indicates that the statute is a "claims-processing" rule, not a jurisdictional bar. Congress did not locate the operative provision in a jurisdiction granting section. This fact supports a non-jurisdictional reading. *Reed Elsevier*, 130 S. Ct. at 1245 (finding provision non-jurisdictional because it "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction"). Rather, signaling its claims-processing nature, the AIA resides instead in a miscellaneous tax code section that governs procedure and administration.

Moreover, that the AIA expressly authorizes *some* pre-enforcement tax challenges indicates that Congress did not mean to impose an absolute bar on federal court review. The *Reed Elsevier* Court found it "important" that Section 411(a) permitted the adjudication of unregistered claims in three circumstances. *Reed Elsevier*, 130 S. Ct. at 1246. The AIA contains fourteen statutory exceptions. 26 U.S.C. § 7421(a). A taxpayer who receives a deficiency notice may file suit notwithstanding the AIA. §§ 6213(a) and § (c). So too for taxpayers who are innocent joint filers, § 6015(e), who have a third-party interest in property, §§ 7426(a) and (b)(1), and whose property has been levied. § 6330(e)(1). As this Court has explained, "[i]t would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions." *See Reed Elsevier*, 130 S. Ct. at 1246; *Zipes v. TransWorld Airlines*, 455 U.S. 385, 393-94,

397 (1982) (exception to EEOC filing requirement indicates the provision is non-jurisdictional).

This Court has sometimes looked to the purpose of a statute as part of its context inquiry. *See Thaler*, 132 S. Ct. at 650. Here, the purpose of the AIA—to facilitate the prompt and efficient assessment and collection of taxes on which the Government depends, *see Williams Packing*, 370 U.S. at 7—suggests that the AIA is not jurisdictional. As the Government has repeatedly explained, this purpose often may be best served by pre-enforcement review.

In *Helvering v. Davis*, 301 U.S. 619 (1937), for example, a shareholder brought suit to restrain the Edison corporation from deducting payroll taxes as required by the Social Security Act. In light of the serious budgetary and administrative problems that would result from a delay in determining the validity of the Social Security tax, the Government intervened and sought pre-enforcement review from this Court. Brief for Petitioners Helvering & Welch at 22, *Helvering*, 301 U.S. 619 (1937) (No. 910). The AIA did not apply, the Government argued, because it "was enacted to promote, not to discourage, the orderly administration and collection of Government revenues." *Id.* at 31. And in *Helvering*, "the litigation of an injunction suit [wa]s more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund." *Id.*

Helvering was not a one-off decision. The Government also sought preenforcement review of the Bituminous Coal Act of 1937 in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). Brief for the Appellee at 9, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Similarly, the Government urged the

Court to review the constitutionality of a tax prior to its enforcement in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895).

To clothe the AIA with jurisdictional status would in every case preclude this Court's prompt review of a tax. As the Government argued in *Helvering,* this would "discourage" rather than encourage the "orderly administration and collection of Government revenues." Brief for Petioners Helvering & Welch at 31, *Helvering*, 301 U.S. 619 (1937) (No. 910). The AIA was intended to protect the public treasury, not limit the authority of federal courts. The core purpose of the AIA, and its structure more generally, indicate that the Anti-Injunction Act is not jurisdictional.

C. This Court's Precedents Confirm That The AIA Is Not Jurisdictional

Congress's failure clearly to indicate that a provision is jurisdictional is ordinarily dispositive. *Reed Elsevier*, 130 S. Ct. at 1244; *Arbaugh*, 546 U.S. at 515-16 (Congress must "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional."). On rare occasions, however, uniform undeviating precedent may tip the scales. *See Bowles*, 551 U.S. at 209-11.

This Court's precedents are far from uniform. Rather, they are irreconcilable with a jurisdictional reading of the AIA in three ways. First, the Supreme Court's early interpretation of the AIA as an equitable statute subject to a number of exceptions cannot be reconciled with a jurisdictional statute. Second, two judicially-created exceptions to the AIA are well-established: The Supreme Court has long held that the AIA does not apply in "extraordinary circumstances" and also when the party challenging a

tax statute has no alternative remedy at law. Finally, the Court has repeatedly accepted the Government's waiver of the AIA defense, and proceeded to the merits—actions inconsistent with a jurisdictional reading of the AIA.

1. Early Precedent Holds That The AIA Is Not Jurisdictional

This Court's early interpretations of the AIA as an equitable statute sound the death knell for a jurisdictional interpretation. Culminating in its 1932 decision in *Miller v. Standard Nut*, 284 U.S. 498 (1932), this Court repeatedly has recognized a variety of equitable exceptions to the AIA. *See* 284 U.S. at 510-11. Because jurisdictional statutes are strict limits on a court's power, each of these judicially created exceptions demonstrates that the AIA is not jurisdictional.

In *Standard Nut*, the IRS imposed a ten-cent per pound back-tax on Southern Nut Product, a vegetable-based spread, under the Oleomargarine Act of 1886. 284 U.S. at 505-06. Prior to the assessment, three federal courts had held similar products non-taxable, and, by letter-ruling, the IRS had informed Standard Nut that its product was not subject to the tax. *Id.* at 504. After Standard Nut marketed its product at a three-cent per pound profit, the IRS changed its mind and sought to collect the ten-cent tax. *Id.* at 508. Standard Nut filed a pre-enforcement suit. *Id.* at 505.

This Court enjoined collection of the tax. The AIA "d[id] not apply," this Court wrote, because of "special and extraordinary facts and circumstances." *Id.* at 511. The Act was merely "declaratory of the principle" that equity usually disallows tax injunction suits. *Id.* at 509. As a result, "extraordinary and exceptional

circumstances"—though not mentioned in the text of the AIA—"render[ed] its provisions inapplicable." *Id.* at 510. Foreshadowing the Court's clear statement requirement, the *Standard Nut* Court wrote that "[t]he general words employed [by Congress] are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate th[e] salutary and well-established rule" that extraordinary circumstances permit a court to enjoin a tax. *Id.* at 509. The Court noted it had "never held the [AIA] to be absolute"—as would be true of a jurisdictional statute—"but ha[d] repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." *Id.* at 509-10 (citing cases recognizing extraordinary circumstances exceptions).

Standard Nut is no outlier. It is consistent with a long line of prior cases treating the AIA as a claims-processing statute subject to equitable exceptions. Early lower courts crafted all sorts of exceptions to the AIA[2]

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[2] *See, e.g.*, *Frayser v. Russell*, 9 F. Cas. 728, 729 (C.C.E.D. Va. 1878) (challenge does not fall "within the letter, or spirit, or intention" of the AIA; multiplicity of suit exception applies); *Burgdorf v. District of Columbia*, 7 App. D.C. 405, 414 (D.D.C. 1896) (exception for "additional special circumstances, bringing the case under some recognized head of equity jurisdiction, such as irreparable injury, multiplicity of suits, or cloud on the title of the complainant"); *Acklin v. People's Sav. Ass'n*, 293 F. 392, 394 (N.D. Ohio 1923) (recognizing the "existence of exceptional cases" which permit review notwithstanding the AIA); *Lafayette Worsted Co. v. Page*, 6 F.2d 399, 400 (D.R.I. 1925) (exceptional circumstances exception); *French Mortg. & Bond Co. v. Woodworth*, 38 F.2d 841 (E.D. Mich. 1930) (same); *John A. Gebelein, Inc. v. Milbourne*, 12 F. Supp. 105, 121 (D. Md. 1935) (enjoining tax and finding that the AIA does not apply to novel cases resulting in "exceptional and unusual hardship" and "irreparable damage."); *Larabee Flour Mills Co. v. Nee*, 12 F.

and went on to enjoin various taxes.[3] So too for the Supreme Court. *See, e.g., State R.R. Tax Cases*, 92 U.S. 575, 613-14 (1875) (AIA codifies the traditional equitable rules that govern tax injunctions); *Pac. Steam Whaling Co. v. United States*, 187 U.S. 447, 452 (1903) (considering equitable exceptions to the AIA).

Beginning in the early 1900s, this Court repeatedly held that the AIA was "inapplicable" in "extra-

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Supp. 395, 399 (W.D. Mo. 1935) (The AIA "does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and where the taxpayer has no adequate remedy at law for its recovery if it is paid by him; [and such] remedy at law must not only be adequate . . . [but also] clear and unquestioned."); *Cohen v. Durning*, 11 F. Supp. 824 (S.D.N.Y. 1935) (adequate remedy at law exception); *Grosvenor-Dale Co. v. Bitgood*, 12 F. Supp. 416 (D. Conn. 1935) (same); *Rieder v. Rogan*, 12 F. Supp. 307 (S.D. Cal. 1935) (same); *Huston v. Iowa Soap Co.*, 85 F.2d 649, 652 (8th Cir. 1936) (The AIA "is not an absolute bar in every case to injunctive relief.").

[3] *Trinacia Real Estate Co. v. Clarke*, 34 F.2d 325 (N.D.N.Y. 1929) (issuing injunction); *Higgins Mfg. Co. v. Page*, 20 F.2d 948, 949 (D.R.I. 1927) (granting injunction; "where there is no adequate remedy at law, the court should have power to grant relief"); *Baltic Mills Co. v. Bitgood*, 12 F. Supp. 132, 135 (D. Conn. 1935) (granting injunction because of inadequate remedy at law and multiplicity of suit); *Danahy Packing Co. v. McGowan*, 11 F. Supp. 920 (W.D.N.Y. 1935) (issuing injunction); *Neild Mfg. Corp. v. Hassett*, 11 F. Supp. 642 (D. Mass. 1935) (same); *Inland Mill. Co. v. Huston*, 11 F. Supp. 813 (S.D. Iowa 1935) (same); *Gold Medal Foods v. Landy*, 11 F. Supp. 65 (D. Minn. 1935) (same); *Regents of Univ. Sys. of Georgia v. Page*, 81 F.2d 577 (5th Cir. 1936) (same); *Kingan & Co. v. Smith*, 16 F. Supp. 549 (S.D. Ind. 1936) (same). Other early cases exist in which the federal courts dismissed under the Anti-Injunction Act but those cases do not indicate that the AIA is ju.isdictional. In those cases, the taxpayers argued only that the AIA did not apply to invalid taxes and the federal courts disagreed. *See, e.g., Snyder v. Marks*, 109 U.S. 189, 192-94 (1883); *Kensett v. Stivers*, 10 F. 517, 522-29 (S.D.N.Y. 1880) (describing cases).

ordinary and exceptional circumstance[s]." *Bailey v. George*, 259 U.S. 16, 20 (1922); *Dodge v. Osborn*, 240 U.S. 118, 122 (1916) (the AIA "plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable").

The Court's early invocation of the extraordinary circumstances exception was not dicta. In *Dodge v. Brady*, the Court relied upon the exception to find the AIA inapplicable: "we think that this [tax] case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits[.]" 240 U.S. 122, 126 (1916). And in 1922, the Court held the AIA inapplicable to tax penalties for regulatory commands in no less than three cases. *See Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). While the Court subsequently clarified that the AIA would apply to "truly revenue-raising tax statutes," it has not renounced the underlying equitable exception. *See Bob Jones University v. Simon*, 416 U.S. 725, 743 (1974) (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)). And in 1935, this Court granted a "motion[] for injunction restraining the collection of the assailed tax" pending certiorari. *Rickert Rice Mills v. Fontenot*, 296 U.S. 569, 569 (1935). This remarkable injunction and exercise of jurisdiction over a suit seeking to "restrain[] the collection" of a tax is irreconcilable with a jurisdictional AIA.

From its earliest days, the AIA also was interpreted to permit a taxpayer without an adequate remedy at law to enjoin a tax. Beginning in the late 1800s, this Court permitted shareholders to challenge "the assessment or collection" of corporate income taxes

on grounds that the shareholders had no adequate remedy at law once tax voluntarily was paid. *Brushaber v. Union Pac. R.R.* Co., 240 U.S. 1, 21-24 (1916); *Graham*, 262 U.S. at 257; *Pollock*, 157 U.S. at 554. The AIA was "inapplicable" where the remedy provided by law was inadequate. *Allen v. Regents of University of Georgia*, 304 U.S. 439, 448-49 (1938). Each of these shareholder cases fell squarely within the terms of the AIA, and yet because equity authorized federal courts to enjoin tax cases when the remedy at law was inadequate, the Court repeatedly found jurisdiction to exist.

Early interpretations of the AIA as an equitable statute did not escape notice. Commentators routinely described a non-jurisdictional AIA. The AIA, Professor Charles Miller wrote, "prohibits the granting of an injunction restraining the collection of federal taxes unless its provisions are rendered inapplicable to a particular case because of extra-ordinary and exceptional circumstances." Clarence A. Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunction*, 71 U. PA. L. REV. 318, 339 (1922-23). *See also* John C. Gall, *Enjoining the United States*, 10 VA. L. REV. 194, 194 (1923-24) ("[D]espite the fact that the text of the AIA does not "make any provision whatever for unusual cases which may arise . . . upon an examination of the decided cases we find that a great number of suits of this character have been entertained in the federal courts."); Joseph L. Lewinson, *Restraining the Assessment or Collection of a Federal Tax*, 14 CAL. L. REV. 461, 462 (1925-26) (summarizing case law and concluding "it would appear that [the AIA] may not be read literally").

Jurisdictional limits are not descriptions of general equitable principles and the Court's early precedents

holding the AIA synonymous with equitable rules are irreconcilable with a jurisdictional reading. In short, as the Supreme Court explained in *Standard Nut*, while the early Supreme Court gave effect to the AIA in a number of cases, "[i]t had never held the rule to be absolute," 284 U.S. at 510-11—as would be true of a jurisdictional statute.

2. This Court's Repeated Invocation Of Two Judicially Created Exceptions Confirms That The AIA Is Not Jurisdictional

The early case law authorizing federal courts to entertain tax challenges has resulted in two well-established judicial exceptions to the AIA. Because federal courts are not authorized to craft equitable exceptions to jurisdictional rules, these present-day exceptions demonstrate that the AIA is not a jurisdictional statute.

a. The Extraordinary Circumstances Exception

As explained above, the Supreme Court has long taken the view that the Anti-Injunction Act does not always apply to cases seemingly within its terms. In 1962, the Court reaffirmed that equitable exceptions apply to the AIA. In *Williams Packing*, the Court of Appeals had enjoined a tax on the ground that "collection would destroy [the taxpayer's] business." 370 U.S. at 2. This Court reversed, but not because the AIA is an absolute bar on federal court review. Far from repudiating exceptions to the AIA, the *Williams Packing* Court endorsed them: "if it is clear that under no circumstances could the Government ultimately prevail, the attempted collection may be enjoined if equity jurisdiction otherwise exists." *Id.* at 7. This

merits-based inquiry cannot be squared with a jurisdictional AIA.

Bob Jones University also confirms that the AIA is not jurisdictional. That case involved a University's constitutional challenge to the IRS's revocation of its tax-exempt status. *Bob Jones*, 416 U.S. at 735-36. This Court first held that the action was a suit "for the purpose of restraining the assessment or collection of any tax" within the terms of the Anti-Injunction Act. *Id.* at 737-38. But that was not the end of the matter. The Court went on to describe a two-factor exception to the "literal terms of § 7421(a)": "first, irreparable injury . . . ; and second, certainty of success on the merits." *Id.* at 737. This Court's recognition of a success-on-the-merits exception means the AIA is not jurisdictional.[4]

b. The No Alternative Remedy At Law Exception

A second present-day exception to the AIA is well-established. As late as 1984, in *South Carolina v. Regan*, this Court confirmed that the AIA does not apply when the remedy at law is inadequate. 465 U.S.

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[4] These two cases do refer to the AIA as "jurisdictional." In *Williams Packing*, the Supreme Court wrote, "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." 370 U.S. at 5. In *Bob Jones University*, the Court wrote that "the Court of Appeals did not err in holding that § 7421(a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought." *Bob Jones*, 416 U.S. at 749. The substance of the cases, however, and the equitable exceptions they endorse make plain that the statute is anything but jurisdictional. Any loose language as to jurisdiction is entitled to no "precedential effect." *See Arbaugh*, 546 U.S. at 511–512.

367, 373-74 (1984). In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." *Id.* at 372. The Court acknowledged that an identical lawsuit by a bondholder would have been barred. *Id.* If the AIA governed jurisdiction, the Court would have been required to dismiss. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Instead, this Court looked to the purposes of the AIA.

Using claims-processing language, the *Regan* Court noted that the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. Since South Carolina was "unable to utilize any statutory procedure" to challenge the bond tax, it had no alternate remedy at law, and the AIA did not prevent the issuance of an injunction. *Id.* at 378. Under *Regan*, the AIA is a claims-processing rule with equitable exceptions; it directs litigants, but does not speak to the power of the courts.

This Court's continued adherence to two equitable exceptions cannot be reconciled with a jurisdictional AIA. These judicial carve-outs cannot be gleaned from the text of the AIA and courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214; *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). Because the Court's power to hear a case is granted by Congress, Congress alone may determine "the manner in which the case shall be brought," and courts "ha[ve] no power to dispense with any of these provisions, nor to change

or modify them." *United States v. Curry*, 47 U.S. 106, 113 (1848).

3. This Court's Repeated Waiver Of The AIA Confirms That The AIA Is Not Jurisdictional

The AIA cannot be jurisdictional because, in addition to subjecting the statute to equitable exceptions, the Court has permitted waiver in at least three cases. Because federal courts "must raise and decide jurisdictional questions" on their own, *Henderson*, 131 S. Ct. at 1202, waiver of a jurisdictional limitation is "impossible." *Bowles*, 551 U.S. at 216. Yet the Government repeatedly has argued that it might waive the AIA defense, and this Court repeatedly has proceeded to the merits.

In 1937, the Government explained its view that the AIA "may be waived by an appropriate officer of the United States." Br. for Pet'rs Helvering & Welch at 31, *Helvering v. Davis*, 301 U.S. 619 (1937) (No. 36-910). In *Helvering*, the First Circuit held that payroll taxes violated the Tenth Amendment. 301 U.S. at 638. Before this Court, the Government argued, not that the First Circuit's decision was premature, but that the Court "should render a decision on the merits" because "waiver [of the AIA] is certainly within the power of the appropriate officers of the Government[.]" Brief for Petioners Helvering & Welch at 28, 31, *Helvering*, 301 U.S. 619 (1937) (No. 910). This Court did just that.

Helvering is not an anomaly. This Court has accepted the Government's waiver of the AIA in other pre-enforcement challenges to federal taxes. In *Sunshine Anthracite*, the plaintiff brought suit "praying for a temporary injunction suspending and

restraining the assessing and collecting or attempting to assess and collect" two taxes imposed by the Bituminous Coal Act of 1937. Statement as to Jurisdiction at 11, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Even though the prayer for relief fell within the terms of the AIA, the Government "expressly waived" its defense under the AIA, and the Court decided the case on the merits. *See* Brief for the Appellee at 9, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Even earlier, in *Pollock*, the Government "explicitly waived" any question as to the AIA during oral argument. 157 U.S. at 554. Once again, the Court rendered a decision on the merits.

Waiver is not an attribute of a jurisdictional statute. This series of cases demonstrates that this Court has long considered the AIA to be non-jurisdictional. *See Bowles*, 551 U.S. at 216 ("[I]f a limit is taken to be jurisdictional, waiver becomes impossible[.]").

At the end of the day, this Court's precedents from *Standard Nut* to *Williams Packing* to *Helvering* foreclose any argument that the AIA is jurisdictional. Under all of these cases, the federal courts retain discretion to exercise jurisdiction in circumstances not contemplated by the plain text. Because the AIA is not "absolute," *Standard Nut*, 284 U.S. at 509-10, it is not jurisdictional.

CONCLUSION

The conscience rights asserted by the plaintiffs in these consolidated cases raise important questions about fundamental liberty interests. Because this Court's cases teach that the AIA is not jurisdictional, it need consider the AIA no further, and may reach the weighty constitutional issues implicated by the contraception mandate.

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